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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. —— 523

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

EUGENE MILLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JOHN J. STAMOS,
State's Attorney,
County of Cook,
2600 South California Avenue,
Chicago, Illinois 60608,
Attorney for Petitioner.

JAMES B. ZAGEL,
Assistant State's Attorney,
Of Counsel.

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Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on June 21, 1968.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported in 40 Ill. 2d ——, 238 N.E. 2d 407 (1968) and is printed as Appendix A. The opinion of the Appellate Court of Illinois is reported in 82 Ill. App. 2d 304, 226 N.E. 2d 413 (1967) and is printed as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on June 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

May a search and seizure ever be justified by the consent of a person whom a police officer reasonably believes has the authority to consent to the search?

Does Stoner v. California deem per se unreasonable and violative of the Fourteenth Amendment every search by a police officer with the consent of a person whom the officer mistakenly believes has the authority to consent, no matter how reasonable the officer's belief?

CONSTITUTIONAL PROVISIONS

United States Constitution
Fourth Amendment

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fourteenth Amendment

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The respondent, Eugene Miller, was indicted for the crime of abortion on February 9, 1965. He was convicted

of that offense by a jury on September 24, 1965. He received a sentence of five to ten years in the penitentiary.*

The evidence at trial is recounted in the opinion of the Appellate Court. (Appendix B) It suffices to say for purposes of this petition that the young woman who was the subject of the abortion, and her roommate testified that respondent had arranged for William Babitsch to perform an abortion which succeeded in terminating the pregnancy but caused substantial internal injuries. Further, an investigating detective testified that respondent said that he and Babitsch split the fee from the abortion and that he himself performed six other abortions. The respondent identified certain surgical instruments found in his car as those used in this line of work.

The introduction of the surgical instruments into evidence (Bill Ex. 272-77)** is the source of the contention brought to this Court.

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*The respondent was jointly tried with William Babitsch who was also convicted. Respondent and Babitsch filed separate appeals to the Appellate Court of Illinois. The Appellate Court affirmed the conviction of Babitsch. People v. Babitsch, 82 Ill. App. 2d 299; 226 N.E. 2d 469 (1967). On review by the Supreme Court of Illinois the conviction of Babitsch was reversed for the erroneous admission of certain physical evidence and for failure to grant a severance. People v. Babitsch, 40 Ill. 2d ——, ——; 238 N.E. 2d 407, 409-10 (No. 40755, 1968). The case of Babitsch is not before this Court.

**The petitioner has certified the entire record in the Supreme Court and Appellate Court of Illinois to this Court. With the exception of the common law record showing indictment, judgment, etc., the only portion of the record that need be considered, and, if the case is taken, printed as an Appendix is the transcript of the motion to suppress evidence. The transcript is quite short and appears at pages 5 through 38d of the Bill of Exceptions.

The respondent filed a pre-trial motion to suppress the surgical instruments. See Illinois Revised Statutes, 1965, Ch. 38, Sec. 114-12. The facts elicited at the hearing on the motion are these:

The respondent was arrested pursuant to a warrant on December 2, 1964 in the foyer of a private home in a suburb west of Chicago. (Bill Ex. 20-21). Respondent, formerly a licensed chiropractor, provided private care to an invalid residing in the house. In light of these services the owner of the house, Mrs. Johnson, allowed him to live there without payment of rent. Mrs. Johnson (apparently the aunt of the invalid) did not restrict respondent's movements in the home. No one room in particular belonged to respondent and he kept his clothes all about the house. (Bill Ex. 10-12)

The officer who arrested respondent at the home spoke to Mrs. Johnson. He asked her who owned the home and she replied that she did. The officer explained his presence and asked for permission to search the house which she granted. (Bill Ex. 21-22) After searching the house the officer asked for permission to search the automobiles in the garage. Mrs. Johnson gave her permission. (Bill Ex. 24-25) The search of a Volkswagen in the garage revealed the presence of a black medical bag containing the medical instruments introduced into evidence at respondent's trial. (Bill Ex. 25-26)

The Volkswagen in Mrs. Johnson's garage, along with another car in the garage, was fitted with license plates registered to Mrs. Johnson. The officer had checked the licenses on the cars in the garage two weeks prior to the date of the search. Both plates on both cars were registered to Mrs. Johnson. (Bill Ex. 27-28) The plate registration was in Mrs. Johnson's name and listed both her first

and last names. (Bill Ex. 35-36). However, it was revealed at the hearing on the motion to suppress that respondent owned the car and had purchased it from a private owner unrelated to Mrs. Johnson. (Bill Ex. 16-17) Respondent gave somewhat confused testimony concerning the license plates saying he didn't recall if he put Mrs. Johnson's plates on his car. He stated that he would not deny putting her plates on his car. (Bill Ex. 18)

The trial court denied the motion to suppress the medical instruments (Bill Ex. 38D), on the basis of the apparent authority doctrine (Bill Ex. 36).

On Appeal to the Appellate Court the respondent argued that the search violated his rights under the Fourth Amendment of the United States Constitution. (Appellate Court Record, Deft's. Br. pp. 17-19) On April 11, 1967, the Appellate Court affirmed on the basis of the doctrine of apparent authority. (Appendix B, App. 12) The respondent petitioned for rehearing arguing that the decision was inconsistent with Stoner v. California, 376 U.S. 483 (1964). The Petition for Rehearing was denied on May 23, 1967. Respondent then sought review in the Illinois Supreme Court claiming that the decision of the Appellate Court was inconsistent with Stoner and other opinions of this Court. (Petition for Leave to Appeal pp. 3-5b) The Illinois Supreme Court granted review and reversed the judgments of the trial and Appellate Courts and remanded for a new trial.* The only stated ground for the reversal of re-

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* Although there is a remand for a new trial the judgment of the Illinois Supreme Court is still a final judgment and may serve as a basis for a Petition for Writ of Certiorari by the State in a criminal case. Miranda v. Arizona, 384 U.S. 436, 498 fn. 71 (1966).

spondent's conviction was that admission of the surgical instruments was inconsistent with the guarantees of the Fourth Amendment as construed in Stoner v. California. (Appendix A, App. 3-4)

REASONS FOR GRANTING THE WRIT

THE IMPORTANT QUESTION OF WHETHER A POLICE OFFICER MAY EVER RELY ON THE CONSENT TO SEARCH OF ONE WHOM HE REASONABLY BELIEVES HAS THE AUTHORITY TO CONSENT IS SQUARELY PRESENTED BY THIS CASE AND SHOULD BE DECIDED BY THIS COURT.

In Stoner v. California, 376 U.S. 483 (1964) the Court said that "rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority'" 376 U.S. at 488.

This language gives rise to two interpretations. Petitioner asserts that "unrealistic doctrines of apparent authority" means that there are some situations in which the doctrine of apparent authority is realistic and acceptable and some situations in which it is not. Stoner involved the latter sort of situation where a hotel clerk consented to the search of a guest's room and where nothing in the record and nothing in the California law (See 376 U.S. at 488, fn. 7) or in common sense would justify an officer's belief that the clerk had authority to consent.

The Supreme Court of Illinois interpreted the language of Stoner to mean that "all doctrines of apparent authority are unrealistic" and ruled, without consideration of the specific facts, that the search of respondent's car was unreasonable, "regardless of the officer's good faith in making the search" (Appendix A, App. 4)

Certiorari should be granted to resolve the question of the proper interpretation of Stoner v. California.

This case presents an especially compelling factual context for the consideration of the apparent authority doctrine. Unlike Stoner, this case involves the case of an officer who enters a private home and secures consent of the undisputed owner to search the home, the garage and the cars in the garage. The respondent lived in the house but, as his testimony revealed, he was not allotted any special room. See Weaver v. Lane, 382 F. 2d 251 (7th Cir. 1967). The case thus presents the classic situation in which apparent authority to consent is upheld, i.e., the consent of a co-occupant and owner of the premises. See People v. Smith, 63 Cal. 2d 779, 799-800; 409 P. 2d 222, 235-36 (1966) cert. den. 388 U.S. 913; reh. den. 389 U.S. 893 (1967) (distinguishing Stoner) People v. Caritativo, 46 Cal. 2d 68, 72-73; 292 P. 2d 513, 515 (1956) cert. den. 351 U.S. 979 aff'd. on other grounds sub nom Caritativo v. California, 357 U.S. 549 (1958) People v. Evans, 249 Cal. App. 2d 764; 57 Cal. Rptr. 836 (1967) People v. Reed, 252 Cal. App. 2d 994, 995-96; 61 Cal. Rptr. 60, 61 (1967).

Further, the police officer had checked the registration of the license plates on the automobiles in the garage and found them listed under the name of the owner of the home and not the respondent.* The reliance of police upon license plates for identification of ownership is widespread. See People v. Henderson, 6 Mich. App. 379, 149 N.W. 2d 258 (1967). Nearly every major city police department publishes a "hot sheet" of license numbers of stolen cars and an officer who fails to stop such a car is subject to discipline. The Chicago Police Department uses a computer to give patrol cars quick information when they check a license. Even irregularities in registration have

* The defendant refused to confirm or deny whether he affixed Mrs. Johnson's plates to his car.

been held to justify an officer's belief that a car may have been stolen. See United States v. Owens, 346 F. 2d 329, 331-32 (7th Cir. 1965). In short, the officer had objective evidence that the car belonged to the owner of the home and, in the absence of indications to the contrary, was justified in believing that she had the authority to consent to the search.

The principal advocate of the doctrine of apparent authority has been Chief Justice Traynor of California. In People v. Gorg, 45 Cal. 2d 776, 782-83; 291 P. 2d 469, 472-73 (1955) Mr. Justice Traynor forcefully stated:

> Defendant was living in the Stevens home, and it is clear that whether he was in fact a tenant, servant, or guest, Stevens believed that he had at least joint control over his quarters and the right to enter them, put them at the disposal of defendant's father, and authorize a search thereof. Under these circumstances the officers were justified in concluding that Stevens had the authority over his home that he purported to have, and there was nothing unreasonable in their acting accordingly. In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. . . . and when as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.

See also: Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke Law Journal 319, 337; LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," 1966 Illinois Law Forum 255, 321.

The essential premise that the exclusionary rule is concerned with "discouraging unreasonable activity on the

part of law enforcement officers" is clearly supported by Mapp v. Ohio, 367 U.S. 643, 651-53, 657, 660 (1961).

The resolution of the problem of apparent authority is very significant to law enforcement. If actual rather than apparent authority is always to be required then a policeman would be well advised to completely abandon the consent search because the risk that some technical concept of property law might void the search is too great. Of course, petitioner advocates the soundness of the apparent authority doctrine but petitioner advocates even more strenuously that this Court resolve the issue and end the uncertainty.

This case is also significant as part of a rising trend in State Courts to decide matters of criminal procedure involving constitutional questions on the basis of applicable federal precedents. The trend is the result of the piecemeal incorporation of certain provisions of the First, Fourth, Fifth, Sixth and Seventh Amendments into the Fourteenth Amendment. Of course, a state court may reach, on the basis of state law, the results required by the United States Constitution and, in the past, they often did. But they do not do so today as the opinion of the Supreme Court of Illinois so clearly shows. The opinion reaches its holding solely on the basis of the Fourth Amendment and the opinions of this Court. The opinion of the Appellate Court of Illinois indicates that, under proper interpretation of federal precedents, Illinois law would not require a reversal in this case. The powerful and ever more pervading influence of this Court on state criminal procedure strongly supports a policy of prompt review by this Court of state decisions rendered under the supposed compulsion of the United States Constitution. The interests of well meaning law enforcement officers, who have no

opportunity to overthrow an onerous decision once it is finally decided against them and who must bind themselves by such decisions, should weigh heavily toward the granting of certiorari in this case.

CONCLUSION

For the reasons given above, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,
2600 South California Avenue,
Chicago, Illinois 60608,
Attorney for Petitioner.

JAMES B. ZAGEL,
Assistant State's Attorney,
Of Counsel.